U.S. Senate
Republican Policy
Committee

Larry E. Craig, Chairman
Jade West, Staff Director

No. 48

Legislative Notice

Editor, Judy Gorman Prinkey

March 23, 2000

S.J.Res. 14 — Flag Protection Constitutional Amendment

Calendar No. 98

Reported favorably April 29, 1999 from the Committee on the Judiciary on a vote of 11 yeas (all 10 Republicans plus Senator Feinstein) to 7 nays (all Democrats); S. Rept. 106-246, with Minority Views (ordered printed on March 20, 2000).

NOTEWORTHY

- By unanimous consent, the Senate will turn to S.J.Res. 14 at 1:30 p.m. on Monday, March 27. The agreement provides that the Senate will first consider a McConnell amendment and then a Hollings amendment. Votes on amendments will occur about 2:15 p.m. Tuesday.
- S.J.Res 14 proposes an amendment to the Constitution which reads in its entirety, "The Congress shall have power to prohibit the physical desecration of the flag of the United States." The resolution now has 58 Senate sponsors (49 Republicans and 9 Democrats),
- The House of Representatives passed H.J.Res. 33 (which is identical to S.J.Res. 14) on June 24, 1999, by a vote of 305-to-124. A proposed constitutional amendment requires a two-thirds vote in both houses of Congress before it can be referred to the States.
- S.J.Res. 14 is a response to two Supreme Court cases, *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a Texas flag desecration statute), and *United States v. Eichman*, 495 U.S. 928 (1990) (striking down the Flag Protection Act of 1989 which Congress enacted as a statutory response to *Johnson*). The vote in both cases was 5-to-4.
- In 1995, 1990, and 1989, the Senate voted on a proposed constitutional amendment to allow protection of the flag. Each time the proposal failed (always gaining a majority but never the necessary two-thirds supermajority).
- The Clinton Administration consistently has opposed a constitutional amendment to grant legislative authority to protect the flag.

BACKGROUND

Forty-nine State legislatures have called for a constitutional amendment on flag desecration (Vermont has not). When the *Johnson* case was decided by the United States Supreme Court in 1989, 48 States (all except Alaska and Wyoming) and the National Government had statutes on the books that punished flag desecration. That national law (enacted in 1968) proscribed "knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it" and set a fine of up to $1,000 and a prison term of up to one year (or both) for a violation. Pub. L. 90-381, codified at 18 U.S.C. §700, and since amended.

U.S. Supreme Court Strikes Down Texas's Flag Protection Act. On June 21, 1989, in a 5-to-4 decision, the United States Supreme Court held that a Texas flag desecration statute was unconstitutional. Texas had convicted a man for publicly burning an American flag as part of a political protest. The Texas statute prohibited the intentional defacing of the national flag (and other objects) if the actor knew that his action would "seriously offend one or more person likely to observe or discover his action." The Court held that the man's conviction had been based on the content of his expressive conduct and was therefore in violation of the First Amendment. *Texas v. Johnson*, 491 U.S. 397 (1989).

In his opinion for a five-member majority (Brennan, Marshall, Blackmun, Scalia, Kennedy), Justice Brennan wrote that, although the burning of a flag is not speech *per se*, it is expressive conduct that is "sufficiently imbued with elements of communication to implicate the First Amendment." *Id.* at 406. Although the "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, it may not proscribe conduct because" of the ideas it expresses. *Id.* The Texas statute was an effort to suppress the expression of an idea — in this case, opposition to certain policies of the Reagan Administration — and was, therefore, contrary to the command of the First Amendment. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414. "We have not recognized an exception to this principle even where our flag has been involved." *Id.*

Four justices dissented (Rehnquist, White, O'Connor, Stevens). In his dissent, Chief Justice Rehnquist wrote:

> "Our Constitution wisely placed limits on powers of legislative majorities to act, but the declaration of such limits by this Court 'is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.' Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about

which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute. . . ." *Id.* at 435.

On the day after the *Johnson* decision was handed down, the Senate passed a resolution expressing profound disappointment with the Court's decision. Ninety-seven Senators voted for the resolution; Senators Gordon Humphrey (R-NH), Ted Kennedy, and Howard Metzenbaum (D-OH) voted against it.

The Flag Protection Act. Responding to the decision in *Johnson*, the Congress of the United States passed the Flag Protection Act of 1989, Pub. L. 101-131 (which became a law without the President's signature). The Act attempted to protect the flag by using a content-neutral standard whereby certain acts were prohibited (mutilating, defacing, physically defiling, burning, trampling) without regard to whether those acts could be considered to "cast contempt" on the flag. The Flag Protection Act was held unconstitutional by the U.S. Supreme Court the next year, *United States v. Eichman*, 495 U.S. 928 (1990), which also was a 5-to-4 decision (the Justices divided as they had in *Johnson*).

The Senate's Recent History on Flag Amendments. The Senate has voted three times on proposed constitutional amendments to allow protection of the flag: On December 12, 1995, the Senate voted 63 yeas (49 R &14 D) to 36 nays (4 R & 32 D), failing to obtain the necessary two-thirds. That resolution was identical to S.J.Res. 14 of this Congress. Republican Senators Bennett, J. Chafee, Jeffords, and McConnell voted against the proposed amendment, and the following Democratic Senators voted for it: Baucus, Breaux, Bryan, Byrd, Exon, Feinstein, Ford, Graham, Heflin, Hollings, Johnston, Nunn, Reid, and Rockefeller.

The first Senate vote was on October 19, 1989, when the Senate failed by a vote of 51 yeas (33 R & 18 D) to 48 nays (11 R & 37 D) to adopt a proposed constitutional amendment. That vote came soon after passage of the Flag Protection Act, and some Senators voted against the proposed constitutional amendment with the hope that the problem could be addressed by an ordinary statutory enactment without resorting to a constitutional remedy.

The second vote on a constitutional amendment was on June 26, 1990, just two weeks after *Eichman* had been handed down, and the vote was 58 yeas (38 R & 20 D) to 42 nays (7 R & 35 D).

The text that was before the Senate in 1990 and 1989 would have allowed both Congress and the States to have legislative power to prohibit the physical desecration of the flag. The current proposal would restore power to Congress only.

This Year's Proposal Explained. This year's Committee report summarizes as follows the purpose and need for S.J.Res. 14:

> "The purpose of Senate Joint Resolution 14 is to restore to Congress the authority to enact a statute protecting the flag of the United States from physical desecration. . . .
>
> "The American people revere the flag of the United States as a unique symbol of our Nation, representing our commonly held belief in liberty and justice. Regardless of our ethnic, racial, or religious diversity, the flag represents our oneness as a people. The American flag has inspired men and women to accomplish courageous deeds that won our independence, made our Nation great, and advanced our values throughout the world. . . .
>
> "For the overwhelming majority of our history, our statesmen, our legislatures, and our courts have recognized the special value of the American flag as a symbol of our sovereignty as a nation and of our commitment to freedom. And through their Federal and State officials, the American people recognized that 'love both of common country and of State will diminish in proportion as respect for the flag is weakened.' *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). Thus, as with numerous other societal interests, the legislatures and the courts balanced society's interest in protecting the flag with the individual's first amendment right to freedom of speech. The legislatures of the Federal Government, the District of Columbia, and some 48 States adopted statutes preventing physical desecration of the flag, and the courts upheld these statutes. Thus, these statutes, and the judicial opinions that interpreted them, struck the balance in favor of the Government's interest in protecting the flag over the individual actor's interest in choosing physical destruction of the flag as the means to convey a particular message instead of the readily available means of oral or written speech to convey the same message.
>
> "In 1989, however, while retaining the traditional balance for numerous other societal interests that affected the first amendment, the Supreme Court broke with legal tradition and restruck the balance in favor of a nearly absolute protection for the interest of the actor in choosing physical destruction of the flag as a means of expressing a particular idea. . . .
>
> "The proposed amendment would restore to the flag the traditional balanced approach that existed for most of our history and continues to exist for other societal interests that affect an individual's interest in freedom of speech. Once restored, the balanced approach would protect the physical integrity of the flag, while retaining full protections for oral and written speech through which an individual may convey his particular message." Senate Rept. at 2-3.

COST

The Congressional Budget Office reports that S.J.Res. 14 could impose additional costs for investigation and prosecution of flag desecration cases, but the costs are not expected to be significant. CBO estimates no cost to state and local governments.

ADMINISTRATION POSITION

No Statement of Administration Policy (SAP) has been received on S.J.Res. 14; however, the Administration did issue a SAP on June 22, 1999, as the House was considering H.J.Res. 33, which is identical to the Senate proposal. That statement is shown below in its entirety; it is similar to past statements from the Clinton Administration:

> "The President is deeply committed to protection of the United States flag and will continue to condemn those who would show it any form of disrespect. The Administration believes, however, that efforts to limit the First Amendment to make a narrow exception for flag desecration are misguided. The Congress should be deeply reluctant to tamper with the First Amendment."

OTHER VIEWS

Senators Leahy, Kennedy, Kohl, Feingold, and Torricelli filed extensive Minority Views. In their conclusion, the dissenting Senators said:

> "There is no need to amend the Constitution. The flag has a secure place in our hearts. The occasional insult to the flag does nothing to diminish our respect for it; rather, it only reminds [us] of our love for the flag, for our country, and [for] our freedom to speak, think and worship as we please. . . . Our soldiers fought not for a flag but for freedom, freedom for Americans and for others across the globe. It would be the cruelest irony if, in a misguided effort to honor the symbol of that freedom, we were to undermine the most precious of our freedoms, the freedoms of the First Amendment." Senate Rept. at 68.

POSSIBLE AMENDMENTS

Under the unanimous consent agreement, there will be two amendments, one by Senator McConnell and one by Senator Hollings. For details of the agreement, please consult the agreement itself. The summaries below do not describe the nuances of the agreement.

Floor amendments to a proposed constitutional amendment may be adopted by simple majority vote. Only on final passage is the constitutional two-thirds required (and note that the unanimous consent agreement does not say when the Senate will vote on final passage). Once a proposed constitutional amendment has been agreed to by both houses of Congress, the amendment is referred directly to the States (it does not go to the President). The consent of three-fourths of the States is required for ratification. The text of the resolving clause of S.J.Res. 14 provides that the States shall have seven years in which to consider the flag amendment.

McConnell Amendment

The McConnell substitute amendment will be called up just after 1:30 p.m. on Monday, March 27. Under the agreement, there are two hours of debate on the amendment, equally divided, with another 30 minutes under the control of Senator Byrd. No amendments are in order to the amendment, but if it is adopted it may be further amended.

The McConnell substitute is expected to be identical to his bill, S. 931 (cosponsored by Senators Bennett, Bingaman, Byrd, Conrad, Dodd, Dorgan, Durbin, and Torricelli). The substitute will be a statutory alternative to the proposed constitutional amendment. The McConnell amendment would amend the U.S. Code to establish jail terms and large fines for (1) damaging a flag "with the primary purpose and intent to incite or produce imminent violence or a breach of the peace," (2) damaging a flag that belongs to the United States, or (3) damaging a flag that belongs to a third party if the damage occurs within the "exclusive or concurrent jurisdiction of the United States."

On December 12, 1995, the Senate rejected an amendment by Senator McConnell that appears identical to the proposal that is expected on the floor next week. The vote was 28 yeas (5 R & 23 D) to 71 nays (48 R & 23 D).

Hollings Amendment

The Hollings first-degree will be called up after conclusion of debate on the McConnell amendment. Under the agreement, there are four hours of debate on the amendment, with one of those hours under the control of Senator McCain. No amendments are in order.

Hollings Amendment (Continued)

The Hollings amendment is expected to be identical to his joint resolution, S.J.Res. 6 (cosponsored by Senators Bryan, Cleland, Daschle, McCain, Reid, and Specter). The resolution would amend the Constitution of the United States to give Congress the power "to set reasonable limits on the amount of contributions that may be accepted by, and the amount of expenditures that may be made by, in support of, or in opposition to, a candidate for Federal office." The same power is given to the several States with respect to elections for State or local office.

The Senate has rejected Senator Hollings's constitutional proposal on several occasions. On March 18, 1997, the amendment was turned down by a vote of 38 (4 R & 34 D) to 61 (50 R & 11 D). On February 14, 1995, Senator Hollings attempted to add his amendment to a House-passed Balanced Budget Constitutional Amendment, but the Senate tabled the amendment on a vote of 52 (49 R & 3 D) to 45 (2 R & 43 D). On April 21 and 22, 1988, the Senate twice failed to invoke cloture on the Hollings amendment, although on each occasion more than a majority of the Senate voted to shut off debate.

Staff Contact: Lincoln Oliphant, 224-2946
RPC Intern Elisha Triplett, James Madison University 2001, helped prepare this Notice.

[For helpful background information, see CRS Report for Congress, "Flag Protection: A Brief History & Summary of Recent Supreme Court Decisions and Proposed Constitutional Amendments" (no. 95-709) (updated June 29, 1999).]